No. 16,390

IN THE

United States
Court of Appeals
For the Ninth Circuit

WICKAHONEY SHEEP COMPANY,
an Idaho corporation,

Appellant,

and

BANK OF IDAHO (formerly Continental
State Bank), an Idaho corporation,

Appellant,

vs.

C. A. SEWELL, ORENE H. SEWELL
and ORVILLE R. WILSON,

Appellees

Appeals from the United States District Court for the District of Idaho.

Opening Brief for Appellants

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I
SUMMARY STATEMENT OF THE CASE, JURISDICTION, PLEADINGS AND PROCEEDINGS.

On May 8, 1957, plaintiffs and appellees, C. A. Sewell, Orene H. Sewell and Orville R. Wilson, commenced this action in the United States District Court for the District of Idaho, Southern Division, against Wickahoney Sheep Company, an Idaho corporation, and Bank of Idaho (formerly Continental State Bank), also an Idaho corporation. The complaint, in three counts, alleged first the breach by appellants of a contract of sale whereby appellees, as the sellers, agreed to sell, and Wickahoney

Sheep Company, as purchaser, agreed to purchase sheep and other personal property, demanding judgment thereon for the recovery of possession of all said property, together with all increase and lambs born of the sheep and all wool clipped or obtained from said sheep, or for the sum of $225,-100.00 in the event the delivery of said personal property could not be had. In the second count, the appellees alleged the Bank of Idaho as the escrow holder of the contract, and that said Bank of Idaho had refused to deliver the executed copy of the contract and the bills of sale deposited with it as such escrow holder, appellees demanding that said documents be delivered by Bank of Idaho to them.

The third count in the complaint involved four chattel mortgages given by Wickahoney Sheep Company to Bank of Idaho covering the sheep and the increase thereof in question, and alleged that said mortgages constituted a cloud on the title of appellees sheep and the increase thereof, and requested that the same be removed of record. (3 to 15, incl.)

On July 19, 1957, appellants filed their answer and counterclaim in the action (19 to 32, incl.), and therein admitted that the plaintiffs and each of them, were citizens of the State of Nevada; that defendant Wickahoney Sheep Company and defendant Bank of Idaho were Idaho corporations. Plaintiffs' allegation of jurisdiction in the amount of $3,000.00 was traversed, but the proof established the amount in controversy in excess of said

sum. By virtue of these admissions that the action was between citizens of different States and because the matter in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00, original jurisdiction existed in the District Court for the State of Idaho, under Title 28, USCA 1332.

In its answer as a separate defense, appellants set out an escrow agreement (27 to 32, incl.), under and by which the contract between appellees and appellant, Wickahoney Sheep Company, was escrowed with appellant Bank of Idaho, alleging that the pretended forfeiture on the part of appellees with respect to the contract was void, since it did not comply with the terms of said escrow agreement. As an additional separate defense and as a counterclaim, defendants Wickahoney Sheep Company, alleged fraud and misrepresentation on the part of appellees with respect to the sale of said personal property, defendant Wickahoney Sheep Company demanding judgment on its counterclaim in the amount of $22,500.00.

Thereafter, appellant Bank of Idaho deposited with the Court all bills of sale and the executed copy of the purchase agreement hereinabove referred to, together with the original chattel mortgages in question. (34) On or about October 11, 1957, appellees filed a supplemental complaint (49, 50), alleging that subsequent to the notice of forfeiture given by appellees to appellant Wickahoney Sheep Company, the latter paid over to Bank of Idaho in excess of $100,000.00, the same being the

proceeds from the sale of sheep, lambs and wool, being the subject matter of the contract as aforesaid, and demanding that said Bank of Idaho account to appellees for all of said moneys.

To this, appellant filed an answer. (82, 83). Upon motion of appellant Wickahoney Sheep Company (41), a receiver was appointed by the Court to take possession of all property of Wickahoney Sheep Company. (51, 52). The receiver was appointed on October 11, 1957. The property in the hands of the receiver consisted of the balance of the personal property in the possession of Wickahoney being subject to the purchase agreement from the appellees, and during the course of administration of the receivership, the same was liquidated, and after payment of all expenses and the receiver's fee, the sum of $54,655.04 was deposited with the Court. Thereafter, Findings of Fact and Conclusions of Law were filed by the appellees (117 to 131, incl.), the same being objected to by the appellants (112), and the Court on December 18, 1958, entered judgment against Wickahoney Sheep Company in the sum of $149,452.68, and against appellant Bank of Idaho in the sum of $86,082.50, conditioned upon any payment by the Bank of Idaho being in partial satisfaction of the judgment against defendant Wickahoney Sheep Company. Judgment was also entered directing the Clerk of the Court to pay the sum of $54,655.04 resulting from the liquidation by the receiver to the appellees in partial satisfaction of the judg-

ment against Wickahoney Sheep Company. (131, 132, 133).

The Clerk of the Court, on December 22, 1958, delivered to the appellees the documents theretofore deposited in the registry of the Court by the appellant Bank of Idaho, the executed copy of the purchase agreement and other related documents, together with the check of the Clerk for the receiver's balance of $54,655.04. (134). Notice of appeal was filed January 12, 1959 by appellants. (140). The respective appellants, on January 12, 1959, filed separate appeals (136-140), and thereafter upon motion and stipulation by all parties and order of the Chief Judge of the United States Court of Appeals for the Ninth Circuit (292), the appeals were consolidated with a single record, only, required, and the appellants permitted to file one brief on appeal. It was further stipulated that the various exhibits be not printed but referred to by the Court and counsel as though printed and incorporated in the record. (275). Jurisdiction of this Court to hear and determine the appeal is based on 28 U.S.C.A., Secs. 1291, 1994, 2107, and Rule 73, Federal Rules of Civil Procedure.

II
SPECIFICATIONS OF ERRORS

I

That the Court erred in making and entering its Finding of Fact VI to the effect that Appellees "duly, regularly and properly" gave notice in writ-

ing of default, in that the evidence shows such notice was not so given in compliance with the agreement of the parties.

II

That the Court erred in making and entering its Finding of Fact VII to the effect that Appellees made demand on Wickahoney Sheep Company for delivery of the property, and that said property was wrongfully and unlawfully detained by said Company, in that the evidence is to the contrary.

III

That the Court erred in making and entering its Finding of Fact XI to the effect that Appellees had duly performed all condition by them to be performed, in that the evidence shows a failure on their part to so perform.

IV

That the Court erred in making and entering its Finding of Fact X, or so much thereof as finds that The Bank of Idaho wrongfully refused to deliver the escrowed documents, the evidence affirmatively showing that such refusal to so deliver was proper and lawful.

V

That the Court erred in making and entering its Finding of Fact XI to the effect that Wickahoney Sheep Company wrongfully sold sheep and lambs, and that the fair market value of the same,

at the time of forfeiture, was $86,082.50, in that Wickahoney Sheep Company had a legal right to sell said sheep and lambs, and that there is no evidence of value thereof at the time of forfeiture.

VI

That the Court erred in making and entering that portion of Finding XII that finds fair market value of the property sold by the receiver to be the sum of $62,370.18 at the time of forfeiture, in that there is no evidence in the record to support such finding.

VII

That the Court erred in making and entering its Finding of Fact XVI insofar as it finds Appellees entitled to possession of the property; that Bank of Idaho had knowledge that the moneys paid it were from the sale of said property, and that said Bank of Idaho wrongfully converted said moneys, for the reason that the evidence is to the contrary.

VIII

That the Court erred in making its Conclusions of Law III, V, VI, VIII, IX, XII and XIV, they being predicated on the Findings of Fact set forth above, the making of which has herein been specified as error.

IX

That the Court erred in making and entering

its final judgment against these Appellants for the reason that the same is contrary to the evidence and to the law.

III

STATEMENT OF FACTS

Appellees, C. A. Sewell and Orene H. Sewell, as Sellers, and Appellant, Wickahoney Sheep Company, as Purchaser, on December 15, 1955, entered into a Purchase Agreement for the sale and purchase of a sheep "spread" including ewes, bucks and miscellaneous equipment and personal property for the total purchase price of $121,700.00, payable $15,000.00 down, the balance of $106,700.00 payable $15,000.00 per annum on October 10 of each year thereafter. (Exhibit 18) (10-15).

Paragraph 5 of the Purchase Agreement covered the matter of default, providing for notice of claimed default in writing be given Purchaser, with ninety days within which to remedy the same. Further, it provided that in the event of forfeiture after notice given, Seller could retake possession of the property described, or its replacements, and retain all payments as liquidated damages.

Although the Purchase Agreement was executed December 15, 1955, possession of all the property was delivered to and received by Wickahoney Sheep Company between October 15 and 18, 1955. (235).

On the same date, coincidentally with delivery, the parties to the Purchase Agreement executed a

Memorandum Agreement (Exhibit 23), which recited the agreement covering the personal property and stated: "in consideration of the execution by Wickahoney of the Lease and Option Agreements" the Sewells would lease and give an option to buy Taylor Grazing Rights for 800 A.U.M.'s, with additional deeded lands of the Sewells to carry these rights. The price to be paid therefor, and the lands to be leased and optioned, to be fixed by a range management expert, Harley McDowell. McDowell made his survey, set aside an additional 360 acres of the Sewells' deeded lands, known as the Nit Creek Range, and set an option price on the 800 A.U.M.'s. of Taylor Grazing Rights on the lands, and gave his information in a report to the parties. (Exhibit 25). (232, 248, 257).

The Sewells also leased to Wickahoney Sheep Company certain lands upon which Wickahoney would run the sheep purchased. (Exhibit 17). This Lease is dated December 15, 1955, and states it is a modification of a prior lease between the parties dated October 18, 1955, covering personal as well as real property. The lands covered by the lease to Wickahoney were insufficient to carry the sheep sold, lacking carrying capacity for 2,000 head for two summer months and all 4,000 head for two winter months, so compliance by the Sewells with the agreement to sell additional grazing rights and deeded land was necessary to sustain the operation to Wickahoney. (258, 259, 260).

The Sewells transferred the Taylor Grazing Rights (Exhibit 20), but refused to sell or lease the base lands as agreed upon and as selected by McDowell. Pursuant to the requirements of Exhibit 23, Wickahoney's attorney, Lloyd Haight, prepared and submitted a lease of the grazing rights and an option to purchase the additional Nit Creek lands, to Appellee Wilson. (Exhibits 28 and 29, respectively). (248, 249, 250). Appellees would not execute the documents nor submit a counter proposal. (252). The lease and option of the additional rights and lands was sent to Appellees in September, 1956. (250).

On the date of execution of the Purchase Agreement (Exhibit 18), an executed copy thereof and Bill of Sale were escrowed with Appellant Bank of Idaho pursuant to a written escrow agreement, signed by all parties. (Exhibit 19). (178, 179). In part and in substance, the escrow agreement required that all default notices be mailed by it to the parties, the escrow holder not being required to recognize service in any other manner. Further, in the event of conflict between the escrow agreement and the Purchase Agreement, the escrow agreement would govern.

Wickahoney Sheep Company failed to meet the payment required in the Purchase Agreement on October 10, 1956. (150, 158, 167). Thereafter, Appellees prepared and sent a Notice of Default to Appellants (Exhibit 6), a copy of the same being received by Bank of Idaho on January 16, 1957,

and one by Wickahoney Sheep Company on January 17, 1957. No request was made of the Bank of Idaho to handle the default notice in accordance with the escrow agreement, and this was not followed by Appellees. (179, 253). On or about April 24, 1957, Appellees' counsel mailed to Appellant Bank of Idaho a letter (Exhibit 10), stating that the contract was forfeited and demanding possession of the escrowed instruments. (157, 158, 184).

No demand, written or oral, for repossession of the sheep and other property was ever made upon any agent or officer of Wickahoney Sheep Company, nor is there evidence that such officer or agents had knowledge of any such demand.

Wickahoney's sheep operation was financed through loans from The Bank of Idaho, commencing with a $20,000.00 loan on October 17, 1955 and continuing to January 1, 1957, when its outstanding loan balance was $100,000.00. In the interim, Wickahoney had repaid approximately $50,000.00 to the Bank. (Exhibit 14). (74, 75, 165, 166). From June 21, 1956 through August 5, 1957, Wickahoney was engaged in selling the lambs, being the offspring of the ewes sold under the contract, and some of the older ewes. After the purported Notice of Default on January 17, 1955, sales of wools, pelts and lambs were made, totalling $86,082.50. (Exhibit 13). (80, 163). The proceeds of the sales were turned over to The Bank of Idaho in payment of the Wickahoney indebtedness. (164, 165). (Exhibit 14).

Four Chattel Mortgages, as security for the loans, were given to The Bank of Idaho by Wickahoney, covering the contract property, bearing dates September 17, 1956, November 1, 1956, November 27, 1956 and January 5, 1957, all having been executed prior to the purported Notice of Default. (53, 54). Upon payment of the final loan as aforesaid, these Chattel Mortgages were satisfied. (53, 54).

In connection with their proof as to values of the replevined personal property, with the exception of one truck valued at $1,000.00 as of April 20, 1957. (171), the record is devoid of testimony fixing fair market value of the personal property as of the alleged date of taking, April 17, 1957. Appellee Sewell, testifying as an expert, fixed the market value of the sheep and lambs as of July and August, 1957, and the wool as of March 19, 1957. (168, 169). This testimony corresponded with the Summary of Sales. (Exhibit 13). The only other evidence of market value in the record is found in the testimony of Appellees' witness Austin, who was also the receiver. His testimony was restricted entirely to the proceeds realized upon his liquidation of the properties *after* the litigation commenced. (191, 192, 193, 194). Appellants offered no evidence whatever of market value. Upon this evidence of market value, the Court predicated its findings of fact, conclusions of law and judgment.

The evidence shows Appellant Wickahoney expended $79,726.00 in its operations during the ten months prior to October 31, 1956 (Exhibit 2), for a net loss of $164.50. That the funds from the sales were used by it in payment of The Bank of Idaho loans and for the expenses of its operation. (78). From its operations between October 18, 1955 and September 30, 1956, Wickahoney had an operating loss in excess of $50,000.00; and between October 1, 1956 and October 8, 1957, an operating loss of $1,555.09. (Exhibit 27).

IV

SUMMARY OF ARGUMENT

(A) Since an action in claim and delivery tries only the question of possession, plaintiffs must fail in this action for the reason that the purported Notice of Default did not effect a forfeiture and appellant Wickahoney Sheep Company was lawfully in possession of the sheep, lambs and wool.

(B) There being no evidence in the record to sustain the Court's Findings as to market value of the property at the time of the alleged wrongful taking, the judgment based on such findings is erroneous.

(C) The Court erred in finding that prior to the commencement of the action, appellees had duly performed all of the conditions precedent of said Purchase Agreement upon their part to be performed. Appellees were in material default and were not entitled to declare a forfeiture.

(D) Assuming an effective forfeiture, and since there is no finding of a wanton or malicious taking, appellant Wickahoney Sheep Company should receive an offset for care and maintenance of the lamb crop. In addition, as title holders for security purposes only, appellees, in their recovery, should be limited to the balance due on the contract.

V

ARGUMENT

(A.) SINCE AN ACTION IN CLAIM AND DELIVERY TRIES ONLY THE QUESTION OF POSSESSION, PLAINTIFFS MUST FAIL IN THIS ACTION FOR THE REASON THAT THE PURPORTED NOTICE OF DEFAULT DID NOT EFFECT A FORFEITURE AND DEFENDANT WICKAHONEY SHEEP COMPANY WAS LAWFULLY IN POSSESSION OF THE SHEEP, LAMBS AND WOOL.

The Court found in Finding of Fact VI:

> "That plaintiffs duly, regularly and properly gave notice in writing of the above mentioned defaults as provided in said Purchase Agreement."

And in its Finding of Fact VII that ninety days after default, appellant Wickahoney Sheep Company wrongfully and unlawfully refused and neglected to deliver possession of said property to the appellees, and that the same were "wrongfully and unlawfully detained and withheld." Further, in its

Finding of Fact X, the Court found that after the declaration of forfeiture, the Appellant Bank of Idaho wrongfully refused to turn over and deliver to appellees the executed copy of the Purchase Agreement and the Bills of Sale. As Conclusions of Law predicated upon the foregoing Findings, the Court concluded that the appellees duly, regularly and properly gave notice in writing of Appellant Wickahoney Sheep Company's failure to perform the Purchase Agreement.

The Court further concluded that a forfeiture was effected ninety days after the Notice of Default. That thereafter the Appellant Wickahoney Sheep Company wrongfully withheld the property being the subject of the Purchase Agreement, and thus appellees had the right to possession under the Purchase Agreement of all property being sold, including all lambs and increase born of said plaintiffs' sheep and then in possession of said Wickahoney Sheep Company.

Exhibit 18 is the original Purchase Agreement between the Appellees, C. A. Sewell and Orene H. Sewell, and Appellant Wickahoney Sheep Company. Paragraph (5) of this Purchase Agreement reads in part, with respect to default and claimed forfeiture:

> "Sellers shall give Purchaser notice of such claimed default in writing, addressed to Purchaser * * *, and thereafter Purchaser shall have ninety days within which to remedy the claimed

default. * * * In the event the Purchaser fails to remedy the claimed default within the ninety day period, Seller may claim a forfeiture of this agreement, and shall have the right to retake possession of the personal property herein described, or its replacements, and the Sellers may retain all payments made hereunder as liquidated damages."

The Purchase Agreement dated December 15, 1955, was executed by the sellers on that date and by Appellant Wickahoney Sheep Company on December 24, 1955.

Exhibit "A" to the Answer and Counterclaim, being Exhibit 19, consists of an escrow agreement dated December 15, 1955, the same date as the Purchase Agreement, between C. A. Sewell and Orene H. Sewell, Wickahoney Sheep Company, and Continental State Bank (now Bank of Idaho). In the event of default being declared by the seller under the terms of this escrow agreement (Exhibit 19), the seller is required to deliver to the Bank notification of the default, in duplicate, with written instructions to the escrow holder to mail the original thereof to the purchaser by registered mail. The escrow agreement further provides:

"All notices given pursuant to the terms of any agreement placed in escrow herewith, must be given through the escrow holder as hereinbefore provided, and said escrow holder shall not be required to recognize service of notice given in any other manner."

"It is further agreed that if any part of the escrow agreement and this agreement are in conflict, then the provisions of this agreement shall govern."

The record, without equivocation, fully establishes that notice of default was not given in the manner required. After the purported notice of default and forfeiture of the Purchase Agreement, appellees made demand upon defendant Bank of Idaho for the escrowed documents. The demand was resisted by Appellant Wickahoney Sheep Company.

It is the contention of the appellants that the purported notice of default in fact did not operate to effect a forfeiture of the Purchase Agreement. In an action for claim and deliver the right to possession of the property is the main issue.

As said in American Fruit Growers, Inc. v. Walmstad, 44 Idaho 786, 260 P. 268:

"In an action to recover personal property, it is essential for the plaintiff to show that he is entitled to immediate possession. In such an action he is not required to establish ownership, but merely a right to the immediate possession. The action is essentially a possessory one, and ownership is only incidental to the main issue. (Citations).

"While it is true that the complaint asserts appellant's ownership of this property, that allegation is immaterial, the right of possession being

the controlling issue, the question of ownership being only incidental thereto."

In this connection, see also:

Largilliere Company, Bankers, v. Kunz, 41 Idaho 767, 244 P. 404;

Commercial Credit Company v. Mizer, 50 Idaho 388, 296 P. 580;

Cunningham v. Stoner, 10 Idaho 549; 74 P. 228.

Smith v. Washburn-Wilson Seed Co., 40 Idaho 191, 232 P. 574, contains the following reference to this subject:

"Primarily the right to possession and not necessarily the title to the property is the controlling question. One may have title and still not have the right to possession, and conversely, one may have the right to possession without title." (p. 195, 196).

Appellees having sued in claim and delivery, they must, in order to maintain the action show their right to possession of the subject matter of the purchase contract between the parties. Appellees cannot do this unless they can sustain their contention that a forfeiture of the contract was effected, entitling them to retake possession, for it is a basic principle that a conditional vendee is entitled to retain and keep in possession the property sold even when in default, until a forfeiture has become effective.

As stated in Peasley v. Noble, 17 Idaho 686, 107 P. 402:

> "This contract was in part executed. The possession of the property had been delivered to the vendees, and a large part of the purchase price had been paid. The forfeiture clause in the contract was purely and wholly for the protection of the vendor. The forfeiture did not take place, however, by operation of law. It was necessary for the vendor to do some specific act in order to put an end to the contract. He was empowered to "immediately take possession of said sheep and increase and any clip of wool, etc." The vendor failed and neglected to avail himself of this provision of the contract until after the vendees had disposed of the sheep involved in this action. So long as he allowed the parties to continue in possession of the sheep without any change or alteration in the original contract, they will be deemed to have still been operating under the contract." (p. 404)

To the same effect:

> Coffin v. Northwestern Mutual Fire Ass'n, 43 Idaho 1, 249 P. 89;
>
> Firpo v. Superior Court (Cal.), 246 P. 165;
> Adams v. Wood (Mich.), 16 NW 788.

It is, of course, axiomatic that forfeitures are not favored either in law or in equity, and that where a contract is subject to forfeiture, the party declaring the forfeiture must comply exactly with

the literal terms of the contract with respect thereto in order to invoke a forfeiture. 12 Am. Jur. 1016 (Contracts, Sec. 436), states the principle:

> "Forfeitures are not favored by the law; indeed, they are regarded with disfavor. It is well settled that forfeitures by implication or by construction, not compelled by express requirements, are regarded with disfavor. Contracts involving a forfeiture cannot be extended beyond the strict and literal meaning of the words used."

In Wonder Products v. Blake, 47 NW 2d 61 (Mich.), it is stated at page 64:

> "It is true that after a purchaser fails to make a payment, the vendor may choose to forfeit the purchaser's interest in the contract, but this can be done by only declaring a forfeiture. Donelly v. Lyons, 173 Mich. 515, 139 NW 246. Hop Farm Corp. v. Neef, 294 Mich. 160, 292 NW 689. The vendor, however, may not ignore the provisions of a contract in regard to foreclosure in the event of a default in payment for personal property."

The law in Idaho is well settled that, in order to terminate a contract, it is necessary that the party so doing comply strictly with the provisions of the forfeiture requirements of the contract under which the parties are operating. Marks v. Strohm, 65 Idaho 623, 150 P 2d 134 (1944), involved a contract for the purchase and sale of land. From the syllabus of the Court at 623:

"Where contract for installment sale of land provided for written notice of termination of contract on default setting forth such default, vendors were bound by terms of notice of termination stating that default consisted of failure to pay delinquent taxes on vendor's lands."

The evidence disclosed that the purchaser of the land had paid the taxes specified as being unpaid in the notice of default prior to the giving of said notice, and that the seller therefore, was not entitled to rely upon any other default by the purchasers in the contract, even though the default otherwise existed. The Court thus insisted upon the strictest compliance by the vendor of the property with the forfeiture provision of the contract document.

The latest Idaho case on this subject is Stockmen's Supply Co. v. Jenne, 72 Idaho 57, 237 P. 2d 613 (1951). Here the purchaser of certain lands under a written contract of sale gave up possession of the land to the vendor for a period of more than seven years. The vendor then brought suit against the purchaser to quiet title, and the judgment of the trial court quieting title in the vendor was reversed on appeal, the Court stating that the vendor had never given the vendee notice of termination of the contract pursuant to its terms, and therefore the vendee's rights to the land had not been terminated. Strict compliance with the contract, even after a seven year "abandonment," was required.

It is admitted, of course, in this case that the forfeiture provisions of the Purchase Agreement between the parties was complied with by the appellees. This merely provided the appellees should give the purchaser-appellant notice of any claimed default by registered mail at its office, and no forfeiture could become effective until ninety days had lapsed from the date of such notice. The parties, however, made and entered into on the same date as the original Purchase Agreement, an escrow agreement with the third party, Bank of Idaho. As pointed out, there was a deviation in the escrow agreement in connection with the forfeiture from the forfeiture requirements of the basic agreement. The escrowing of a contract of sale with the related documents, bills of sale, deeds, etc., with a bank is a customary method of doing business. While the bank escrow agreement provided for thirty days within which to rectify default, it provided for a specific method of declaring a forfeiture, that is, delivery of the specific notice of default to the bank the mailing *by the bank of the notice to the defaulting party;* and the agreement further provided that the bank need not recognize service in any other manner; that in the event of conflict, it should govern. This agreement was executed voluntarily by all three parties to it, and it must be read in conjunction with the original agreement. Wiesenberger v. Mayers, 117 N.Y. Supp. 2d, 557.

When parties provide in an escrow agreement for a definite and certain procedure for declaring

a forfeiture, the courts are insistent that a strict and literal compliance with such terms is the only act to be recognized before such forfeiture is effective. Malta, et ux, v. Phoenix Title & Trust Company, 259 P. 2d 554, involved an action by vendors who sold realty owned, subject to contract, to purchaser, who assumed vendors' contract, whereafter the rights of parties under their respective contracts were forfeited when the purchaser defaulted and vendors failed to make the payments under the original contract, to recover for loss of realty from the escrow agent, on the ground that the agent acted negligently. The action of the trial court in dismissing the complaint was sustained on appeal, the Court stating, at page 557:

> "The Title Company could not alter the legal rights between the parties to the escrow agreements. It is true that an escrow agent is a trustee and must act in strict accordance with the terms of the escrow agreement or it will be liable in damages for any loss suffered by reason of any departure from those terms; however, in the instant case it does not appear that there was any dereliction of duty upon the part of the defendant and hence the plaintiffs have no one but themselves to blame for any loss they may have suffered. They cannot visit it upon defendant."

In Davisson v. Citizens National Bank of Roswell, 113 P 598 (N.M.), one Davisson, acting as

agent for a purchaser, entered into an agreement to purchase certain real property. The moneys in payment therefor were deposited with the defendant bank, together with a memorandum stating the conditions under which the bank should hold the money. Thereafter, the plaintiff made demand on the bank for the money, but the bank turned the money over to the vendor of the property. Suit was instituted by Davisson against the bank to recover his commission on the sale. The appellate court, after observing that the Court below determined the bank's liability to be fixed and limited by the memorandum, stated at page 599:

> "Admitting the correctness of this holding for the sake of argument, the question then is, did the bank fulfill its duty to the appellants as fixed by the memorandum? To this question we think the reply should be in the negative, for the reason that no where in the memorandum was the bank authorized to make any delivery of any paper, money or anything. Had the appellants both agreed that Mr. Berryman should have his money or check back, then the bank would have been relieved from any liability, but it owed just as much duty to the appellants as it did to Berryman, and should not have taken sides, and, when it failed to secure appellants' consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into

court and secured its acquittance. However, it took sides in this matter, and will be held, as it should be, to have acted at its peril and to be responsible to appellants for the fund if they can show a right to the same under the contract made with Berryman, either in its original form or as amended by the parties to it. The law governing the duties of the bank in this case is well stated by Page in his work on Contracts: "The depositary of an escrow is regarded as an agent of both obligor and obligee, and he can neither return the deed or other instrument to the former without the latter's consent, nor save upon the fulfillment of the agreed conditions deliver it to the latter without the former's consent." 2 Page, Contracts, 585. There happened no condition, as set forth in the memorandum, upon the fulfillment of which or failure to fulfill the bank was directed to return the papers to either party."

To the same effect:

Jolin v. Spira, 210 P 2d 704 (Cal.);

Loyd v. Southwest Underwriters, et al, 169 P 2d 238 (N.M.);

Sweifach v. Scranton Lace Company, 156 Fed. Sup. 304 (Pa.);

Roberts v. Carter & Potruch, 295 P 2d 515 (Cal.).

In Dunlap v. Albuquerque National Bank, 247 P 2d 981 (N.M.), the defendant, as escrow holder

of a construction contract between the plaintiff and a contractor, released certain funds in escrow to the designated contractor, upon certification by an architect as provided in the agreement, even though the bank had been warned that the contractor had defaulted in the performance of the contract and the residence had in fact been constructed by another contractor. It was observed that a copy of the contract was in the possession of the bank. In addition, upon receiving the payment from the bank, as escrow holder, the contractor immediately paid back over to the bank the said moneys on an indebtedness that he owed the bank. This suit was to recover the purportedly unauthorized payment. On page 984, we find:

> "The only contract by which the bank was bound was a letter containing the terms of the escrow which had been accepted by it in writing, endorsed on the bottom of the escrow letter. * * *
>
> "However, the bank's contract was the escrow letter. It was not signatory of the contract between the plaintiffs and Algire * * *
>
> "Nevertheless, it was wholly ineffective unless the bank was bound by the contract between the plaintiffs and Algire, which it never signed nor agreed to observe. We have held that the contract was not a part of the escrow agreement between the bank on the one hand and the plaintiffs and Algire on the other. * * *"

The Court then quoted with approval from 19 Am. Jur. 435, Sec. 17:

> "Where a person assumes to and does act as the depository and escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. It is not in his province to interpret or construe a contract where he has a duty to perform; he must be guided in his duty by what the contract says."

And in commenting upon the contention that the bank paid out the money erroneously to the contractor, who received the money, then turned around and paid the money back to the bank on a debt owed by the contractor, at page 983 stated:

> "Unquestionably, this fact is the major circumstance causing the plaintiffs to feel that the bank had wrongfully diverted funds subject to their order contrary to terms of the escrow. It resulted in this action to recover the amount thereof as moneys belonging to the plaintiffs, claimed to have been embezzled by the bank and appropriated to its own uses. However, if the money actually belonged to Algire under the terms of the escrow, it was his to do with as he pleased and the mere fact that he immediately applied it on indebtedness owing to the bank, in no manner detracts from his right to have done so."

In Montgomery v. Bank of America, National Trust & Savings Ass'n, 193 P 2d 475 (Cal.), in connection with the unauthorized act of the es-

crow holder in making changes in a deed which was escrowed with it, the Court, at 478, observed:

> "If the subject of this action were personal property, defendant would be answerable in damages. As a depositary, an escrow holder is required to obey the instructions of the parties as to delivery of property deposited with him. (Citations)."

It is submitted that the appellees, contrary to the terms of the escrow agreement, attempted to serve on Defendant-Appellant Wickahoney Sheep Company directly, and not through the escrow holder, a notice of default, and thereafter to declare a forfeiture of the contract. At no time have either of the appellants recognized the validity of this notice, relying instead, as we feel they had the right to do, on specific compliance with the terms of the escrow agreement with respect to the forfeiture. If the forfeiture was ineffective, then the contract itself was not terminated, and not only do appellees have no right to question the bank's refusal to recognize the forfeiture, but in addition the contract between the appellant Wickahoney Sheep Company and appellees is still in force and effect, and the trial court erred in entering its judgment in favor of appellees and against both of these appellants.

(B.) THERE BEING NO EVIDENCE IN THE RECORD TO SUSTAIN THE COURT'S FINDINGS AS TO MARKET VALUE OF THE PROPERTY AT THE TIME OF THE ALLEGED

WRONGFUL TAKING, THE JUDGMENT BASED ON SUCH FINDINGS IS ERRONEOUS.

It is submitted that the Court erred in awarding judgment against Wickahoney Sheep Company in the amount of $149,452.68, and against the Bank of Idaho for the sum of $86,082.50, which was paid to it by Wickahoney. There is absolutely no evidence in the record upon which to make a determination of values *at the time of the forfeiture.*

The Notice of Default sent to the Bank was received January 16, 1957. Therefore, assuming for this discussion, the Notice of Default to be effective ninety days from the date received, this would make the wrongful taking on April 18, 1957, being the date when right to possession ceased. Bearing in mind these dates, it is basic that in an action for replevin or the statutory action of claim and delivery as here involved, if the property cannot be redelivered to the plaintiff, then he is entitled to its value, the value to be determined as of the time of the taking.

In its Finding of Fact VII, the Court determined that the wrongful taking, insofar as Wickahoney Sheep Company is concerned, occurred ninety days following the receipt of default when that appellant wrongfully refused to turn over and deliver the property and detained the same from the appellees. Finding of Fact IX discloses that between July 2, 1957 and August 5, 1957, inclusive, appellant Wickahoney Sheep Company sold sheep and

lambs for the total purchase price of $86,082.50, and that the fair and reasonable market value of said lambs and sheep sold by Wickahoney "at the time of the forfeiture of said purchase agreement was the sum of $86,082.50."

The wrongful taking, if one there was, having occurred in April of 1957, the only proof of the value of the sheep prior to the trial, was from the sales made in July and August by Wickahoney Sheep Company. Appellee Sewell, testifying as an expert, testified as to the fair market value of lambs during July and August of 1957, and further, that lambing was normally begun in the middle of January and that the lambs stayed on their mothers until shipment, usually in July or August. No testimony whatsoever is in the record as to the value of suckling lambs in April, 1957, the time of the alleged forfeiture.

Again the testimony of plaintiffs' witness Austin (also the Receiver), who testified as an expert, was absolutely confined to the market value of the sheep sold subsequent to the time he took possession of the same as receiver, and particularly as to sheep sales in November of 1957. No testimony was elicited from this witness as to the value of the sheep and lambs at the time of the purported forfeiture. And yet the Court's finding recites that on or about October 9, 1957, the balance of the property was turned over to the Receiver Austin, and subsequently sold by him, and the sum for which he sold this property *was the value of the*

property at the time of forfeiture. The witness also testified as to the value of lambs in July and August, 1957, and that his sales were made at the then fair market value. No testimony was given as to the value of lambs at the time of the forfeiture.

Thus, the value of the property at the time of the taking was never determined, and there is not one iota of evidence in the record upon which to base the Court's Findings or Conclusions. There is no proof and none was put in as to the value of the property at the time of the alleged forfeiture. The Court, having used figures which were clearly established to have represented values at various times after the time of taking and after commencement of the action, did not render a judgment for the correct value. It has been long established in Idaho that the measure of damages in a claim and delivery or replevin action, is the value of the property at the time of the taking. In Cornwall v. Mix, 3 Idaho 687, 34 P. 893, it is stated:

> "The measure of damages in actions of replevin, where the property sought to be recovered has a usuable value, is the value of the property at the time of the taking, with the value of its use from the time of the taking. The instruction upon this point asked by plaintiff correctly states the law, and should have been given. Its refusal was error." (p. 894)

Again in Tannahill v. Lydon, 31 Idaho 608, 173 P. 1146, the Court on appeal, approved the following instruction given by the trial judge as to the measure of damages in a claim and delivery action:

> "The jury is instructed that in an action of this character if it is shown by a proponderance of the evidence that the plaintiff was the owner of the property in controversy, which was taken by the defendant, and entitled to the immediate possession thereof, and that said taking was wrongful, the measure of plaintiff's damages herein is the value of the property so wrongfully taken at the time of the taking, with the reasonable value of the use of the said mare from the time of the taking to this date."

In Unfried v. Libert, 20 Idaho 708, 119 P. 885, the law is stated as follows:

> "But where, as in this case, the facts show that the appellant wrongfully took possession of the mortgaged property and retained the same and converted such property to his own use or permitted it to be lost or injured or destroyed, he is responsible to the owner for the market value of such property at the time the same was taken." (p. 891-892)

Precisely in point is the case of Armour v. Seixas (Wash.), 141 P. 308, which involved a claim and delivery action for the repossession of an automobile. The complaint alleged a value to the automobile of $1,000.00, which was denied by the answer of the defendant. At the trial no proof what-

ever was put in of the value of the automobile at the time of taking or otherwise. There was evidence in the record that at the time the automobile was originally sold to the plaintiff the value was $1,000.00, and the wrongful detention from the plaintiff was approximately six months later. The Court, sitting without a jury, found the value of the automobile at the "time of trial" at $1,000.00. From the opinion on appeal:

> "Obviously a finding of value by the Court is also essential to sustain the judgment where the cause, as in this case is tried to the Court without a jury. * * *
>
> "The finding that the automobile was actually worth $1,000.00 at the time of the trial cannot be sustained upon either theory. It was immaterial in any event, according to what we believe the better rule under a statute such as ours. The value of the machine at the date of its conversion in December, 1911, was the material thing, not its value at the time of the trial in March, 1913. (Citations)"

Hager v. Gordon, 171 F 2d 90 (C.C.A. 9), involved a replevin action for delivery of a boat and barge. The plaintiff demanded the return of the vessel or the sum of $25,000.00. The jury was instructed that the value of the vessel was $55,000.00. In the Court's opinion, Judge Orr stated at page 92:

"The evaluation thus placed on the property is erroneous in two respects. In the first place, appellant alleged a value of $25,000 in his complaint; hence, he was limited to that amount of recovery in the event the boat and barge could not be delivered. (Citations). Further, the sole testimony from which the $55,000 figure was taken related to the value of the boat and barge when new. While the cases are not uniform as to whether valuation in an action for recovery of personal property should be measured as of the time of a wrongful taking or as of the time of trial, none suggests the values should be as of the time when the property was new. (Citations). The proper measure of value in the instant case was at the time of the alleged wrongful taking."

Without evidence to support a finding of market value of the sheep, wool and lambs at the "time of taking," the Court could only speculate that the values shown for July, August and November, 1957 were the same as those on the date of taking, April 18, 1957. The livestock and wool markets traditionally fluctuate a great deal, with substantial variations in market quotations over short periods of time. On April 20, 1957, was the sheep and lamb market up or down? What about the wool market? Without the facts, we can only guess—we submit an essential element of appellees' case is missing—evidence of value at the time of taking.

(C.) THE COURT ERRED IN FINDING THAT PRIOR TO THE COMMENCEMENT OF THE ACTION, APPELLEES HAD DULY PERFORMED ALL OF THE CONDITIONS PRECEDENT OF SAID PURCHASE AGREEMENT UPON THEIR PART TO BE PERFORMED. APPELLEES WERE IN MATERIAL DEFAULT AND WERE NOT ENTITLED TO DECLARE A FORFEITURE.

All of the property, subject to the contract (Exhibit 18) was turned over and delivered to Wickahoney Sheep Company between October 15 and October 18, 1955. (235). On October 18, 1955, and prior to the execution of the Purchase Contract, (Exhibit 18), on December 15, 1955, a Memorandum Agreement was entered into by and between the Sewells and Wickahoney Sheep Company, referring to the Coig property, which consisted of real property, livestock and other personal property. On December 15, two documents were negotiated between the parties, the Purchase Agreement and the Lease of the real property which was to hold and contain the sheep. The record amply supports that the property covered by these two documents was identical with the property referred to in the Memorandum Agreement, in other words, the Coig sheep spread. Under the Memorandum Agreement, the Sewells agreed to transfer or lease to Wickahoney Sheep Company, Taylor Grazing Rights for an additional 800 A.U.M.'s, with an option to purchase said rights, and also a Lease and

Option to purchase sufficient deeded lands from the Sewells to meet the requirements of the United States Grazing Service with respect to base lands, said lands to be adjacent and accessible to the Coig property. The land Lease (Exhibit 17) was assigned to the Ruby Company, and the Ruby Company then orally leased the property back to Wickahoney Sheep Company for the base rental and taxes involved. (252). In the Memorandum Agreement (Exhibit 23), the parties agreed that one Harley McDowell would select and then place a value upon the rights and deeded land to be transferred. Harley McDowell then did make an appraisal of the lands involved and selected the additional base land which would be required from the Sewells to maintain the bands of sheep. Witness McDowell testified as an expert and stated that the lands leased in connection with the sale under the Purchase Agreement were not adequate to run the 4,000 head of sheep, the subject matter of the contract. As a result of the appraisal made by Mr. McDowell, it was testified that the attorney for Wickahoney, Lloyd Haight, prepared a Lease and Option (Exhibits 28 and 29) which were submitted to appellees covering the land which they had agreed to transfer to the Wickahoney spread, but these papers were never executed by the plaintiffs, nor was a counter proposal ever made by the plaintiffs. As a matter of fact, it was necessary for the defendant to rent additional lands for grass to hold its sheep, from the Sewells, as shown by defendant's Exhibit 24.

The Purchase Agreement contemplated the sale of the personal property; the Lease supplied the land upon which the spread would be maintained, and in addition, appellees agreed that additional base land would be taken out of their property, leased and optioned to Wickahoney in order to run the 4,000 sheep. The record is clear that all of those documents tie together and were necessary for an effective sheep operation. The record therefore shows that at the time of the alleged attempted declaration of default and forfeiture, the appellees themselves were not in compliance with the terms of their agreement, and thus the Finding of the Court to the contrary is erroneous. In this connection, the testimony, in broken english, of appellant's witness Lezamiz, is quite confusing, but it is clear from the record that additional base lands were required to run these sheep, and there was inadequate summer range so to do, which would be augmented by the deeded ground with the 800 A.U.M.'s. of Taylor Grazing Land which appellees agreed to, but did not transfer.

At the time Appellees served Notice of Default and also at the time they declared the purported forfeiture, they were in substantial default of their agreement to transfer their additional deeded lands to Wickahoney to support the 800 A.U.M.'s. of Taylor Grazing Rights. Although such transfer was prepared by Wickahoney's counsel and submitted, appellees refused to comply.

We repeat, in law or equity, forfeitures are abhorred. Apellees' right to recover is predicated on right to possession. If the agreement is not forfeited, then appellees have no possessory right—it remains in appellant, Wickahoney Sheep Company.

To sustain this position, we refer to a recent Idaho decision, Huggins v. Green Top Dairy Farms, Inc., 75 Idaho 436, 273 P 2d 399. Here plaintiffs, as vendors, sold to defendant, under conditional sale contract, a dairy business, including real and personal property. Plaintiffs gave notice of default on part of defendant in failing to meet certain payments, and for other items of default. Forfeiture was then declared and plaintiffs demanded possession of the property, which was refused. Suit was then instituted for possession of the property and for appointment of a receiver. The evidence developed that at the time defendant was allegedly in default, the plaintiffs had not delivered a deed and had failed to perform other requirements of the contract, including the appointment of an agent to represent the plaintiffs in additionally required negotiations with defendant (there being seven plaintiffs). Judgment for the plaintiffs was reversed on appeal.

We quote from the opinion:

"Further, at the time the notice was given and this action instituted, and for a long time prior thereto, plaintiffs were and had been in default under the contract in several material particulars. They did not deliver the deed and bill

of sale provided for in the contract, nor did they appoint an agent as therein required to represent them in dealings and negotiations with defendant. They failed to perform on their part the terms of the contract which would have made a determination of plaintiffs' unliquidated claim possible.

"The failure of plaintiffs to designate an agent with authority to represent them in negotiations and dealings with defendant was a matter of importance. * * *" (p. 405)

"As the plaintiffs in this case had refused to perform their part of the contract in several particulars, they were not in a position to repudiate the entire contract and demand performance relative to payment for the merchandise and other unliquidated sums. 12 Am. Jur. 959, Sec. 382. Further, one cannot declare a forfeiture of a contract where he himself is materially in default. Giffin v. Faulkner, 50 Idaho 190, 294 P. 521." (p. 406)

In Giffin v. Faulkner, 50 Idaho 190, 294 P. 521, at p. 522, we find:

"Appellants title to the mortgage which they seek to foreclose, derived under the contract, is necessarily based upon a forfeiture. Forfeitures are not favored by the Court. (Citations).

"One may not declare a forfeiture while he himself is in default. Walsh v. Coghlan, 33 Idaho

115, 190 P. 252; Kesler v. Pruitt, 14 Idaho 175, 93 P. 965."

We respectfully submit that it was a material breach of appellees' agreement when they failed, refused and neglected to transfer the additional base lands owned by them, and as selected by McDowell in accordance with the agreement of all parties, to Wickahoney. Under the law, therefore, they were in no position to and could not effect a valid forfeiture.

(D.) ASSUMING AN EFFECTIVE FORFEITURE, AND SINCE THERE IS NO FINDING OF A WANTON OR MALICIOUS TAKING, APPELLANT WICKAHONEY SHEEP COMPANY SHOULD RECEIVE AN OFFSET FOR CARE AND MAINTENANCE OF THE LAMB CROP. IN ADDITION, AS TITLE HOLDERS FOR SECURITY PURPOSES ONLY, APPELLEES IN THEIR RECOVERY, SHOULD BE LIMITED TO THE BALANCE DUE ON THE CONTRACT.

It is noted that the original contract price was $121,700.00. Appellants made a payment against this purchase price of $15,000.00, leaving a balance due of $106,700.00 on the contract. Appellant Wickahoney took possession of the property until turned over to the receiver, and while it received from the sale of sheep, lambs and wool during the course of the time that it held the property, it expended a large sum, as shown by the evidence, to maintain and pay the expenses of the operation. The judgment of the Court does not award appellees any

amounts for lambs and wool sold *prior to the declaration of forfeiture*, but it does award them the proceeds from the sale of sheep, lambs and wool sold by Wickahoney Sheep Company subsequent to the Notice of Default. The total amount of the judgment is $149,452.68 against Wickahoney Sheep Company. This amount is approximately $43,000.00 over and above the original contract price. Remaining in the receiver's hands after liquidation of the property delivered and turned over to him and after payment of expenses of receivership, is the sum of $54,655.04 already delivered into the hands of appellees. This amount, when added to the purported fair value of the property in the hands of the receiver, totals the judgment entered against Wickahoney Sheep Company. The Court allows nothing for the care and maintenance of the sheep, the lambs, or the expenses of the operation, but gives to the appellees the value of the property without consideration for the expense of maintenance, which is an unconscionable recovery.

Appellees have asked for return of the property or its value. They have not asked for damages, punitive or otherwise. It is the general rule that where the plaintiff receives the value only of the personal property rather than its return he is not entitled to damages for the value of use of the property.

In this case, such value for use would be the proceeds from the sheep, that is, the lambs and wool produced therefrom. 46 Am. Jur. Sec. 145,

p. 79 (Replevin), 77 CJS 206, Sec. 280 (b) (Replevin).

While appellants did not plead a counterclaim or offset for the cost of taking care of the herd, the rule in this connection is stated as follows:

> "Where the taking is in good faith the general view seems to be that if the value of the property is enhanced by the skill and labor or money of the wrongdoer, the owner is entitled to a recovery of the property or its enhanced value, less an allowance to the innocent wrongdoer of an amount equal to the difference between the original and increased value of the property, or the value of the property in its converted form, less the value of labor expended with a limitation in some jurisdictions that such expenses cannot exceed the increase in the value of the property * * *." 77 CJS 198 (Replevin Sec. 273)

See also: State v. Shovelain Carpenter Company (Minn.) 64 NW 81.

Here, Wickahoney Sheep Company held the sheep under claim of right originally and retained the sheep on its bona fide claim that the Notice of Default was improperly given. Thus, there should be set off against the value of the sheep and increase at the time of the wrongful detention, the expenses of the defendant in producing, caring for and maintaining the increase. We note further that the Court has made no finding that defendant's withholding was wanton or malicious, and it is

submitted that, even though the Notice of Default and forfeiture be declared effective, that the appellant Wickahoney Sheep Company was in good faith in demanding literal compliance with the forfeiture provisions of the escrow agreement. In Guerin v. Kirst (Cal.), 202 P. 2d 10, 7 ALR 2d 922, where the defendant was a bona fide innocent purchaser from the conditional vendee, the Court found that damages for detention of a tractor was the reasonable value thereof less the cost of repairs and upkeep on the tractor. The Court was of the opinion that such damages must be reasonable and not disproportionate to the original contract price.

The Purchase Agreement (Exhibit 17) provided in part, in the event of forfeiture that the seller (appellees) "shall have the right to take possession of the personal property, herein described, or its replacements, * * *." There was no provision in the Agreement prohibiting the purchaser from mortgaging the property and it is clear that a conditional vendee of property has a right to mortgage such property.

> "It is generally recognized that a conditional vendee acquires an interest or special property which he can sell, mortgage, lease, exchange, make a gift of or otherwise dispose of without consent of the vendor." 47 Am. Jur. 132 (Sales, Sec. 924).

The Courts in Idaho have recognized such a special interest, the leading case thereon being Coffin v. Northwestern Mutual Fire Ass'n, 43 Idaho 1, 249 P. 89.

> "The essential incidents of property are transferred to the vendee along with possession and right of use of the property, as if the property were his own, and all that remains is his debt entitled to the property as security."

See also: Peterson v. Universal Insurance Company, 53 Idaho 11, 20 P. 2d 1016.

And prior to a forfeiture, and even though he be in default, the conditional vendee may mortgage, sell, or otherwise dispose of his interest in the property to a third party. National Cash Register Company v. Wapples (Wash.), 101 P. 227, 87 ALR 944. It is suggested therefore, that the conditional vendee, appellant Wickahoney Sheep Company, had the right to mortgage to the Bank, and it had in the absence of any restriction in the contract, implied authority to sell lambs and wool resulting from the band of sheep sold. The implied authority to sell, at least before default, is apparent from the judgment of the Court. And since, as is maintained, no forfeiture existed, the proceeds from the sale of lambs and wool could properly be applied to the indebtedness to the Bank.

It is basic that the conditional vendor holds title merely for security purposes, and the possessive right and the property right is in the conditional

vendee. In Road Equipment & Material Co. v. McGowan (Miss.), 91 So. 2d 554, it is stated that where a plaintiff has a limited interest in the chattel, by way of security for payment of the balance due on the purchase price, "the judgment should be for the return of the personal property, or in the alternative, for the value of the plaintiff's interest therein measured by the balance due with interest and damages." (p. 556). Also in Hickman-Williams Agency v. Haney (Neb.), 40 NW 2d 813, the Court quotes with approval the following from Creighton v. Haythorn (Neb.), 68 NW 934:

> "Where the defendant in an action of replevin claims a special interest only in the property in controversy by virtue of a mortgage or other lien, his measure of damages in case the property cannot be returned is the amount of his lien with interest and costs, within the value of the property."

Thus the appellees were in that precise position —holding title for security purposes only—and should in no event be allowed to recover more than the balance due on the contract as the value of the property.

In Robins v. Welfare Finance Corporation (Ga.), 96 SE 892, at p. 894, we find:

> "We recognize the rules that . . . (b) as between the original purchaser and seller, the agreed price stated in a contract of sale is prima facie evidence of actual value, (Citation)."

Also in connection with the measure of damages in a replevin action where the plaintiff is a security holder or has title for security purposes as a special interest only in the property, Frontier Motors v. Chick Norton Buick Company, 279 P. 2d 1032, at p. 1035, states:

> "In the Higgins case, supra, as here, the successful party had only a special interest in the property and we there laid down the formula now relied upon by defendants in order to do justice between the parties under the peculiar facts of that case. Fairly construed that decision stands for the proposition that in a replevin action a plaintiff having only a special interest in the goods in controversy cannot recover more than the amount of his special interest. In other words, the plaintiff is only entitled to be made whole.
> * * *
>
> "In the instant case it appears from evidence which is uncontradicted, that plaintiff's special interest, i.e., the balance presently due on the contract including the costs of retaking and attorney's fees as provided thereunder, far exceeds the value of the automobile. Under these circumstances—there being no privity of contract—plaintiff is entitled to recover the full value of the car in question, assessed at that value which it had at the time of trial."

We submit that should the purported forfeiture be declared and found effective, that the true measure of damages in this case would be the unpaid

balance on the contract, less the 206 old ewes sold in the fall of 1956 shortly after Wickahoney Sheep Company took over the spread, and at the outside, the value of the lambs at the time of the purported taking in April, 1957, less the expenses of Wickahoney in producing, caring for and maintaining such lambs.

VI

CONCLUSION

For the reasons set forth herein, the judgment by the trial court should be reversed. Appellees' entire case is based on their possessory right to the personal property at the time of filing of the Complaint, which right of possession, in turn, is dependent on the effectiveness of the attempted forfeiture.

Since the Notice of Default did not comply with the forfeiture procedure specified in the controlling escrow agreement, and further since appellees were in substantial default in their failure to transfer to appellant Wickahoney Sheep Company, the designated Nit Creek acreage which was necessary to the sheep operation, such forfeiture was ineffective to terminate the agreement.

In addition, there being no proof to sustain the findings and judgment with respect to the value of the sheep, lambs and wool at the time of the taking, such judgment can be sustained on no basis but speculation and conjecture as to such values.

DATED at Boise, Idaho this 17th day of July, 1959.

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